8-3-2009

Kirk-Hughes Dev., LLC v. Kootenai County Bd. of County Comm'rs Appellant's Reply Brief Dckt. 35730

IN THE SUPREME COURT OF THE

STATE OF IDAHO

IN THE MATTER OF THE APPLICATION OF KIRK-HUGHES DEVELOPMENT, LLC, FOR PLANNED UNIT DEVELOPMENT CHATEAU DE LOIRE

KIRK-HUGHES DEVELOPMENT, LLC

Appellant,

vs.

KOOTENAI COUNTY BOARD OF COUNTY COMMISSIONERS; ELMER R. CURRIE; RICHARD A. PIAZZA, AND W. TODD TONDEE,

Respondents.

and

NEIGHBORS FOR RESPONSIBLE GROWTH, A non-profit unincorporated Association; NORBERT and BEVERLY TWILLMANN, husband and wife, SUSAN MELKA; BILL and SYLVIA LAMPARD, husband and wife; DAVID and BARBARA WARDSWORTH, husband and wife; and HEATHER BOWLBY,

Intervenors/Respondents.

Supreme Court No. 35730

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, for Kootenai County

Honorable JOHN PATRICK LUSTER, District Judge

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ISSUES AND FACTS RAISED BY RESPONDENT AND INTERVENORS FAIL TO OVERCOME THE OPENING BRIEF'S COMPELLING ARGUMENTS.

The County ("Respondent) and Neighbors for Responsible Growth ("Intervenor") misrepresent the facts and misapprehend the law in a further arbitrary and capricious attempt to justify the Board of County Commissioners ("BOCC") bowing to political pressure and refusing to fulfill its legal obligations as a quasi-judicial body by effectively legislatively rezoning the land in question.

First, at the second hearing the BOCC unreasonably and unethically ignored the post mediation agreement reached by the parties while the first appeal was pending to limit the issues on remand to the Board, which Respondents admit that KHD fully satisfied (Respondent's Brief at p. 26). Respondents only rely on the District Court's legal finding that estoppel didn't apply- a purely legal question for this court, and they could introduce wholly new issues at the second hearing. The law on these issues –fully established in Idaho and nationally – is clear. Kirk-Hughes Development, LLC, under these circumstances was entitled to have its application for a planned unit development ("PUD") approved based on the satisfaction of the post-mediation terms Indeed, neither Respondent nor Intervenor effectively contradict the established law based on quasi-estoppel and administrative res judicata.

Second, the facts as to the County's arbitrary and capricious conduct are quite startling. Kirk-Hughes Development, LLC ("KHD") sought to build a private resort community of 475 dwelling units, with extraordinary set asides for open space and preservation of all wetlands, on land zoned by Respondent for an allowable as of right density of 1,000 dwelling units. KHD submitted an application for a quasi-judicial administrative planned unit development ("PUD"),

not a legislative rezoning. KHD's plans met all planning and engineer infrastructure requirements for fire and roads, water and sewer, environmental preservation and open space, as found in the County Planning Staff Report (Record on Second Appeal, 2065-2301). The County Hearing Examiner held extensive public hearings, and found that KHD's plan "is compatible with the goals and policies of the Comprehensive Plan" and recommended approval, subject to certain standard conditions, which KHD agreed to undertake. (March 2, 2006 Hearing Examiner Report, Record on First Appeal, 1655-57)

At the first BOCC hearing, citizen objections were raised that **no new growth** should be permitted at all on KHD's land (Transcript of July 13, 2006 Proceedings, Record on First Appeal, Vol. 2). Chairman Currie, without BOCC authority or notice to KHD, conducted an illegal ex parte amateur "traffic study" by twice driving Highway 97 (Transcript of July 27, 2006 Proceedings, Record on First Appeal, 0394-96), which "study" he thereafter convinced the entire BOCC to adopt in lieu of the Idaho Transportation Department's ("ITD") study, Planning Staff, the Hearing Examiner and KHD's traffic experts that KHD's development had adequate capacity on Highway 97 and met all traffic safety requirements. KHD had actually agreed in the post-mediation agreement to construct a bridge over Highway 97, which further reduced the demand on the highway created by the KHD development. Indeed, ignoring the findings of the Hearing Examiner based on expert testimony and the written findings of the ITD, the BOCC denial arbitrarily and capriciously found:

> "The position of ITD was not supported by the public testimony or the personal experiences of the BOCC. As a body the BOCC has almost one-hundred and fifty years of experience living in Kootenai County. The members have, over the years, traveled Highway 97 for personal as well as professional reason [sic] both for the County and in private employment. It has been their personal experience that Highway 97 in its present state is not conducive to this increased level of development." (ROA, First Appeal, 1966).

Third, the BOCC, as a matter of law, wrongfully concluded that the "single most relevant question is whether this project is appropriate for the location," completely ignoring the fact that their legislative rezoning question was answered in the affirmative when the property was previously zoned as consistent and compatible with the comprehensive plan and properly located for approximately 1,000 dwellings – more than double what KHD was seeking to build.

KHD brought the matter before the District Court. During the appeal, the parties entered into a Post-Mediation Agreement wherein the Board and KHD identified the specific actions that KHD could take to obtain a permit/approval of the PUD, and expedited the hearing process so that KHD could comply with the requirements and move forward.

KHD fulfilled all of its obligations under the Post-Mediation Agreement and filed with the County, a slightly revised application with the few modifications required to meet the terms of the Post-Mediation Agreement, together with a subdivision plat application, in anticipation of the agreed upon expedited hearing process. The County Planning Staff, which was intimately involved in the process, recommended approval with the standard conditions (County Planning Staff Report, Record on Appeal, 2065-2301).

The BOCC, instead of hearing the issues raised under the Post-Mediation Agreement, appears from the record of intervenor objections to all development on the KHD property, to have gone totally out of its way to find any excuse to deny KHD approval, concluding that while the KHD application did satisfy the Goals of the County's Comprehensive Plan that were at issue under the Agreement – but then added five new Goals of incompatibility, that the first Board and Hearing Examiner findings did not raise and to which they had no objections.

II. RESPONDENT'S ARGUMENTS PROVIDE AMPLE SUPPORT JUSTIFYING RATHER THAN REPUDIATING THE FACT THAT THE BOARD'S FINDINGS AND CONCLUSIONS DENYING THE KHD QUASI-JUDICIAL APPLICATION WERE ARBITRARY, CAPRICIOUS AND AN ABUSE OF DISCRETION.

A. The Comprehensive Plan Argument.

Appellant is frankly puzzled as to how Respondent can claim the BOCC's finding the application to be incompatible with the County' comprehensive plan was not arbitrary, capricious and an abuse of discretion. For the District Court to uphold the BOCC's decision under the clearly erroneous standard, it must still conclude that the record contains some reliable, probative and substantial evidence in support of the Board's position. See, I.C. §67-5279(3)(d): (3)"....the Court shall affirm the agency action...unless the Court finds that the agency's findings, inferences, conclusions or decisions are (d) *not supported by substantial evidence on the record as a whole*" *Dovel v. Dobson*, 122 Idaho 59, 831 P.2d 527 (1992). Where such lack of substantial evidence occurs, erroneous decisions of the administrative agency will be corrected on appeal. *Homestead Farms, Inc. v. Board of County Commissioners of Teton County*, 141 Idaho 855, 119 P.3d 630 (2005).

On page 12 of its brief, Respondent identifies seven (7) goals listed in the comprehensive plan – Goals 4, 7, 9, 14, 17, 23 and 24 – that the application allegedly did not meet. Yet mysteriously, the BOCC, on August 24, 2006, did not find that KHD was incompatible with Goals 4, 9, 17, 23 & 24. (Appellant's Opening Brief, pp. 26-27) and indeed the Hearing Officer found and concluded that the KHD application met all of the Comprehensive Plan Goals (March 2, 2006 Hearing Examiner Report, Record on First Appeal, 1655-56).

The BOCC failed to give proper consideration to the Hearing Officer's findings of fact, conclusions and recommendations. Where the Administrative Agency's findings disagree with

those of the *hearing panel*, the court will scrutinize the agency's findings more critically. *Paul v. Board of Professional Discipline of the Idaho State Board of Medicine*, 134 Idaho 838, 11 P. 3d 34 (2000). Under the Administrative Procedure Act, in reviewing agency action, the Court is required to engage in a thorough probing in depth review. *Western Watershed Project v. Kraayenbrink,* 538 F. Supp. 2d 1308 (D. Idaho, 2008).

Where the evidence on appeal is without substantial and reasonable conflict, it becomes a question of law for the Supreme Court as to whether the evidence will support the conclusion reached by the Board. *In Re Pacific National Life Assurance Company*, 70 Idaho 98, 212 P.2d 379 (1949), and the Court uses "free review." *Riverside Development Company v. Vandenberg,* 137 Idaho 382, 48 P.3d 1271 (2002). In a recent land use approval case, even involving rezoning of the land, this Court held that where there is a mistaken interpretation of fact in denying the zoning on even one point, no less than the total absence of substantial evidence for all of its conclusions as in this case, the City erred. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584,590, 166 P.3d 374 (2007).

Although the district court in this case did not take into account the Hearing Examiner's findings, conclusions and recommendations, the appellate court will **scrutinize** the agency's factual findings **more critically** if they contradict the Hearing Examiner's conclusions, than if they accord with the Hearing Examiner's findings. *Woodfield v. Board of Professional Discipline of Idaho State Board of Medicine*, 127 Idaho 738; 905 P.2d 1047 (1995).

The only two Goals, 7 & 14, raised at the first hearing were related to hazardous areas and traffic, which the post-mediation agreement specifically addressed and all conditions relating to those two Goals were completely satisfied. KHD abated all traffic congestion by building the

bridge over Highway 97 and mitigated all wetlands and hillside areas. See the County Planning Staff Report of August 23, 2007 finding that all conditions had been satisfied and the KHD development application was completely compatible with all Comprehensive Goals (Record on Second Appeal, 2065-2301). As the post-mediation application was nothing more than a slightly modified version of the original application to address the limited two Goal issues agreed upon in the Post-Mediation Agreement, the only rational conclusion is that the Respondent's findings and conclusions based on five new goals it found to be in compliance in the first hearing are arbitrary, capricious and an abuse of discretion. Where an agency changes its course by rescinding its prior action, it is obligated to supply a reasoned analysis for the change beyond that which is required in the first place. *Western Watershed Project v. Majetko*, 468 F. 3d 1099 (9th Cir., Idaho, 2006).

Respondent merely stretches its already weak position by looking to *Urrutia v. Blaine County,* 134 Idaho 353, 2 P.3d 738 (2000) for justification of the BOCC's improper reliance on the comprehensive plan to deny KHD's application, but *Urrutia* does not support Respondent's position. This Court's position in *Urrutia*, and throughout Idaho case law, supports KHD's position:

> "[A] comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. §67-6508. This Court has held that **a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions.** [*citations omitted*]. The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction. See I.C. §67-6511." *Urrutia,* 134 Idaho at 357-58; 2 P.3d at 742-43 (Emphasis added).

In other words, where the BOCC is deciding to revise or adopt a zoning ordinance, the comprehensive plan should serve as its guide. We can assume that the BOCC looked to the comprehensive plan as a guide when it **zoned** the land for approximately 1,000 dwellings as a use by right. In the present instance, there was no request to revise or adopt a zoning ordinance, and there has never been any question but that KHD's application for 475 dwellings falls well within the density and size limitations of the zoning ordinance.

In *Urrutia*, this Court was faced with strikingly similar facts. There, the appellants were denied a permit to build a subdivision that comported with the zoning ordinance because the development supposedly did not strictly comply with all of the provisions of the comprehensive plan. There the court ruled that:

> "It is to be expected that the land to be subdivided may not agree with all provisions in the comprehensive plan, but a more specific analysis, resulting in denial of a subdivision application based solely on non-compliance with the comprehensive plan elevates the plan to the level of legally controlling zoning law. Such a result affords the Board unbounded discretion in examining a subdivision application and allows the Board to effectively re-zone land based on the general language in the comprehensive plan. As indicated above, the comprehensive plan is intended merely as a guideline whose primary use is in guiding zoning decisions. **Those zoning decisions have already been made in this instance**, and land subdivided into twenty-acre lots and used for single family residences is specifically permitted in this agricultural area. Thus, we agree with the district judge that the Board erred in relying completely on the comprehensive plan..." *Urrutia* at 358-359. (Emphasis added.)

As in *Urrutia*, KHD was entitled to rely on the legally controlling zoning law, which permitted approximately twice as many dwellings as KHD was seeking to build. When the BOCC found KHD's applications to be incompatible with the surrounding neighborhood, it effectively re-zoned the property, purportedly using the general policies

set forth in the comprehensive plan (with which in fact the KHD development application complied and was compatible) as the overt basis for denying KHD's application.

It is entirely **inappropriate** for the BOCC to revisit the question of whether development that comports with the applicable zoning should be allowed, yet that is exactly what Respondent did here, despite clear Idaho law to the contrary.

B. Water Service.

On page 16 of its brief, Respondent concedes that KHD planned to build water storage units to be used if the project could not draw down its allotted water from Lake Coeur d'Alene and from five (5) wells on the property, yet argues that the BOCC was "not satisfied that KHD had made adequate plans for water service" in low water years.

Pointedly, the Hearing Officer found that "the services and facilities (available water service) necessary to serve the development are feasible, available and any adverse impact will be adequately mitigated". (March 2, 2006 Hearing Examiner Report, Record on First Appeal, 1655-1656). Similarly, the County Planning Staff found that the plans for water service were fully adequate. (County Planning Staff Report, Record on Second Appeal, 2065-2301). Ironically, neither the BOCC during the initial application process, nor during the mediation, nor the terms of the Post-Mediation Agreement, where the BOCC had ample opportunity to raise such a concern, address this issue.

Only after the fact, after KHD has fulfilled its obligations under the Agreement, does this issue arise. Respondent provides no basis for this conclusion – no specific findings, no expert testimony to contradict the Hearing Examiner, the Planning Staff or the Idaho Department of Water Resources ("IDWR") which issued water permits – just undocumented lay opinions and

statements made by members of the public. Indeed, Respondents concede that KHD had obtained permits from the IDWR that fully met the water requirements of the project on a permanent basis (Administrative Record, p. 2208-10, 3729-35) (Respondent's Brief, p. 16). Moreover, KHD satisfied the IDWR requirements during any droppage of the Spokane River by requiring that KHD build storage facilities to meet any shortfall (Administrative Record, 2208-10, 3729-35).

C. Wastewater Treatment

Similarly with regard to wastewater treatment, Respondent **concedes** that KHD's wastewater treatment facility was acceptable to the Idaho Department of Environmental Quality (IDEQ) (Respondent's Brief at p.17), which found it to be adequate and safe, yet argues that its rejection of the project was appropriate because the BOCC concluded, **without a shred of evidence** to support it, that a **hypothetical** failure of the system could lead to effluent flowing to neighboring properties. Yet this very same system was used, with County approval, at another development of far greater density, on a permanent basis at the nearby Gozzer Ranch and Lake Club.

Pointedly, the Hearing Officer found that "the services and facilities (including waste water treatment) necessary to serve the development are feasible, available and any adverse impact will be adequately mitigated". (March 2, 2006 Hearing Examiner Report, Record on First Appeal, 1655-1656). Similarly, the County Planning Staff found that the plans for wastewater treatment were fully adequate. (County Planning Staff Report, Record on Second Appeal, 2065-230).

Again, this was not an issue for the Hearing Officer or the BOCC during the initial application process or the mediation, and the Post-Mediation Agreement, where the BOCC had ample opportunity to raise such a concern, does not address it. Only after the fact, after KHD has fulfilled its obligations under the Agreement, does this issue arise. Respondent provides no basis for this conclusion – no specific findings, no expert testimony – just the apparent lay opinion of the BOCC and statements made by members of the public.

D. Wetlands

Respondent's arguments pertaining to wetlands are simply more of the same – inaccurate. KHD proposed turning the 23 acres of wetlands presently on the property into 30 acres of wetlands. The Agreement called for, and KHD agreed, that "[a]ny disturbance of wetlands shall be in compliance with federal, state and local regulations and permitting, including those of the United States Army Corp of Engineers."

Tom Duebendorfer, a professional wetlands scientist, prepared a revised Wetlands Impact Analysis and Proposed Conceptual Wetlands Mitigation report, setting forth how KHD would mitigate hydrologic protection areas (HPAs) beginning with the mitigation for HPA encroachments, including HPAs on creeks, HPAs on wetlands and HPAs in areas adjacent to proposed wetland fills.

Respondent alleges in its brief at pages 18-19, **for the first time**, that the KHD failed to comply with subsection 9-15-7(C)(2) of the zoning ordinance. Specifically, Respondent emphasizes that proposed roads and utilities are to be kept to a minimum, and that the Board may require an easement. (Respondent's Brief, pp. 18-19). This alleged issue was never raised by the Hearing Examiner, by Planning Staff or by the BOCC at any time. Moreover, not only is this the

first time this issue has been raised, but Respondent provides not a scintilla of evidence to support its contention. This is just another example of the County coming up, after the fact, with "findings" to support its pre-conceived decision to kill this project, and of the arbitrary and capricious nature of the County's actions in this instance. Respondent's argument that KHD failed to adequately mitigate potential damage to wetlands is sheer hyperbole.

Instead, the BOCC relied on "public testimony that man-made wetlands do not perform as well as natural wetlands" (Respondent's Brief, page 19). Again, no evidence but statements of lay opinion were provided and the scientific evidence was ignored. See *W.W.P. v. U.S. Fish and Wildlife Service,* 535 F. Supp. 2d 1173 (D. Idaho, 2007) (a presumption of agency expertise may be rebutted if there is no reasoned scientific expertise behind its decision).

E. Runoff and Erosion

Respondent again relies on the comprehensive plan, which identifies certain soil types as susceptible to slippage, to argue that the property is inappropriate for development, but ignores the fact that the County previously zoned the property for approximately 1,000 dwelling units, which would create twice the slippage on a conventional subdivision as of right. Indeed, the Planning Staff Report of August 23, 2007 found:

> " Based on zoning designations, the maximum potential number of residential lots for this site is approximately 1050 lots...It should be noted that...the proposal has *reduced* the maximum potential density to less than half of the potentially allowable dwelling units." (County Planning Staff Report, Record on Second Appeal, 2065-2301)

The Respondent can't have it both ways. It cannot zone a property for this level of development, and then deny the application based on notion that the land is unsuited to building a development with **half** as many units! The Hearing Officer found that there was no prospect of

runoff and erosion from the property because the plans had sophisticated stormwater management design and management. (March 2, 2006 Hearing Examiner Report, Record on First Appeal, 1655-1656). Similarly, the County Planning Staff found that the plans for stormwater management were fully adequate. (County Planning Staff Report, Record on Second Appeal, 2065-2301).

Respondent's answer is to cling to the materials submitted by William Boyd, a local attorney. What is left unstated is that Mr. Boyd's materials are 12 years old, and were prepared in opposition to a zoning change concerning an application to do *mining* on acreage **not** included in KHD's 578 acres! This may be the most irrelevant document the BOCC relied on and is perhaps the most prominent evidence of why the BOCC's actions must be deemed arbitrary and capricious and an abuse of discretion.

F. Transportation

In arguing the transportation issues raised by KHD, the Respondent focuses on the phrases and parts it wants, and simply misstates the facts in order to support its decision. Contrary to Respondent's statement at page 21 of its brief, the East Side Highway District (ESHD) did **not** oppose the project, it merely outlined several suggestions and criteria that need to be met – many of which KHD has already met or initiated. With regard to the description of the terrain as "mountainous" versus "rolling," which Respondent gives so much weight, ESHD in its own letter to the Kootenai County Planning Department, states the "terrain is rolling to mountainous." (August 14, 2007 EDHD letter, ROA pp. 2509-2512).

As noted in Respondent's Brief, the Idaho Transportation Department (ITD) concurred with the methodology and findings of the Transpo study and with the proposed overpass over

Highway 97, to be build by KHD, and concluded that Highway 97 would not reach 80% of capacity until 2022. Despite this, the Respondent suggests that the existence of construction traffic could be "significant," implying that no one should ever build anything because there might temporarily be trucks on the highway as a result.

Perhaps the most disturbing example of the arbitrary and capricious nature of the process in this instance is the BOCC's reliance on amateur traffic studies of Highway 97. Although the BOCC acknowledged that the issues surrounding Highway 97 fall under the jurisdiction of the ITD, it nevertheless completely disregards ITD's professional assessment of the highway's capacity, relying instead, upon Chairman Currie's novice survey. Even though Mr. Currie took his drive of Highway 97 in 2006, he brought it before the Board in December 2007, stating:

> "Uh, I have major concerns with Highway 97. Uh uh and what happens to 97 in the future. Right now there is uh (inaudible) that approximately if everybody from the east side of the Lake comes in today and wants a building permit we would have to issue in the neighborhood of four thousand building permits. And that road just can't handle it. So, what do we tell those people down the line uh when the road does not handle it that could have gotten a building permit today" (Exhibit 13, pg. 8, lns. 3-10; A.R. 3928:3-10)

Commissioner Piazza made a similar statement:

> "The highway is another issue that there are 1500 homes out there right now the possibility of another 4500 just with the existing parcels." (Tr., Vol. 3, p. 415, ll 9-15).

What is the legal basis for a Commissioner making a decision concerning an application currently before the Board based on the hypothetical of what other members of the public might or might not choose to do months or years "down the line?!" This is a gross violation of I.C. §67-6535, which sets forth in pertinent part:

> "(c) It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, the courts of the state are directed

> to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions in light of practical considerations with an emphasis on fundamental fairness and the essentials of reasoned decision-making."

Moreover, it is a clear violation of KHD's due process rights. A quasi-judicial officer must confine his decision to the record produced at the public hearing. *Idaho Historic Preservation Council v. City of Boise*, 134 Idaho 651; 8 P.3d 646 (2000). In *Comer v. County of Twin Falls*, 130 Idaho 433; 942 P.2d 557 (1997), the Twin Falls Board of Commissioners violated the Appellant's due process rights when they viewed the property without giving notice and without giving the parties the opportunity to be present. In the instant case, Mr. Currie, Chairman of the BOCC, chose to do an amateur traffic study on his own and without notice KHD. He then used his results to testify against the project, to convince his fellow Board Members to vote against the project and to himself vote against the project. This Court in Comer, found:

> "The opportunity to be present at a view provides opposing parties the opportunity to rebut the facts derived from the visit that may come to bear on the ultimate decision and create an appearance of bias. A view of the subject property without notice to the interested parties by a Board . . . has been held a violation of due process." *Comer,* 134 Idaho at 438; 8 P.3d at 562.

There is no evidence that four thousand permit applications waiting to be brought before the Board. There is no basis in law or fairness for a County to discriminate against KHD by requiring it to step aside in order to permit some mythical applicants to come forward.

G. Emergency Services

Respondent sets forth on page 22 of its brief that Emergency Medical Services (EMS) is provided by the Coeur d'Alene Fire Department. Respondent again misstates the facts. As was stated in letters to the Kootenai Planning Department, the East Side Fire Protection District ("ESFD") is increasing its services to include first responder capabilities, so the issue of a 20-

minute drive is both irrelevant and moot (March 29, 2007 ESFD Memo, ROA p. 2505). As conceded by Respondent (Respondent's Brief at p. 22):

> "In an effort to mitigate these concerns, ESFD required KHD to convey land for a fire station, pay for the construction of the station, and build a helipad suitable for air ambulance service, conditions which were agreeable to KHD. (Agency Record, 2450, 2511)."

All of these conditions were agreed to, despite the great cost involved, by KHD.

H. Respondent Disregards All Expert Testimony in Favor of Public Comment and Cannot Point to a Single Public Agency Supportive of its Conclusory Findings.

The Court is obligated to overrule the "factual" findings of the BOCC when, as here, they are unsupported by substantial and competent evidence. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657; 67 P.3d 1265, 1269 (2003); *Curtis v. M.H. King Co.*, 142 Idaho 383; 128 P.3d 920, 922 (2005).

The facts throughout this process have shown the BOCC to have had a troubling habit of completely disregarding the experts – those working for the State of Idaho and for Kootenai County, as well as those retained by KHD – and instead deferring to, and relying exclusively on, the opinions of its members and on statements by the public. Again and again, Respondent points out that the BOCC is relying on "public testimony." While conceding that KHD was relying on the support of all the state agencies, the Hearing Examiner and the County Planning Staff, the Respondent also concedes that despite the County's own lack of expert testimony or documentation, KHD produced substantial and even voluminous expert and scientific evidence, conceding:

> "KHD certainly provided voluminous evidence in support of the Chateau application, including plans, studies and other documents prepared by engineers and other design professionals." (Respondent's Brief, p. 15)

Respondent further alleges at page 15-16 that public testimony and comments received by public agencies raised concerns. Yet in neither of their briefs can Respondent or Intervenor **cite to a single state, county or local public agency that supports the County's position on any point.** At the same time Respondent concedes that all state agencies, ITD, IDWR and IDEQ have approved of KHD's plans.

The only local agencies Respondent identifies as purportedly opposing the project are the East Side Highway District ("ESHD") and the East Side Fire Protection District ("ESFD"), but even there, Respondent's contention is unsupportable. A review of the ESHD letter of August 14, 2007 (A.R. 2509-2512) clearly evidences no such opposition, merely an outline of several suggestions and criteria to be met – all of which KHD has already met or initiated in both of its applications.

A review of the ESFD memorandum of March 29, 2007 (A.R. 2505-2506) sets forth that that KHD has "**already paid taxes** for sufficient stations and vehicles to provide for necessary emergency vehicles" (emphasis added) and upon KHD (1) meeting all relevant international fire codes and (2) deeding one acre of land to ESFD, ESFD "will have **no life-safety related objections** to approval of the PUD." (A.R., 2505-2506) (Emphasis added).

Similarly, the ESFD memorandum of August 16, 2007 (A.R. 2504) sets forth that KHD will (1) comply with all relevant international fire codes; (2) deed one acre of land to ESFD for a fire station; and (3) pay to build a fire station. It goes on to say: "When the above requirements are satisfied, ESFD will have **no life-safety related objections** to approval of the PUD." (A.R., 2504) (Emphasis added).

Quasi-judicial determinations must be based upon competent evidence and acceptable scientific documentation, not unsupported statements of possible future events, or on some

layperson's opinion. The Court is obligated to overrule the "factual" findings of the BOCC when, as here, they are unsupported by substantial and competent evidence. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657; 67 P.3d 1265, 1269 (2003); *Curtis v. M.H. King Co.*, 142 Idaho 383; 128 P.3d 920, 922 (2005). Anything less is inherently arbitrary and capricious.

III. THE RESPONDENT BOCC IS BARRED BY THE QUASI-ESTOPPEL BRANCH OF THE EQUITABLE ESTOPPEL DOCTRINE FROM VIOLATING ITS POST-ARBITRATION AGREEMENT WITH APPELLANT, KHD.

Intervenors' brief fails to discuss the estoppel issues raised by KHD before the BOCC, the district court and in the KHD opening brief on appeal, thus conceding those issues to Appellant. The Respondent County brief mistakenly asserts at page 31, that as a matter of law KHD could not meet any of the elements of equitable estoppel, which respondent asserts, in contradiction to the clear law of quasi-estoppel, requires: (1) a false representation of a material fact; (2) that the party asserting the estoppel did not know or could not discover the truth; (3) the false representation was made with the intent that it be relied upon; and (4) the person to whom the false representation was made, relied and acted upon the representation to its prejudice, citing *Twin Falls Clinic & Hospital Bldg. Corp. v. Hamill*, 103 Idaho 19, 22, 644 P. 2d 341,344 (1982), ignoring the *Christiansen v. City of Pocatello*, 142 Idaho 132, 124 P. 3d 1008 (2005) holding that quasi-estoppel and equitable estoppel are part and parcel of the same doctrine; and that there is no need to show detrimental reliance, *Atwood v. Smith*, 143 Idaho 110, 138 P. 3d 310 (2006); nor any misrepresentation of fact or detrimental reliance in establishing quasi-estoppel. *C & G, Inc. v. Canyon Highway District No. 4*, 139 Idaho 140, 144, 145, 75 P. 3d 194,198 (2003) ("quasi-estoppel applies when (1) the offending party took a different position than its original position, and (2) either the offending party gained an advantage or caused a disadvantage to the other party).

In Allen *v. Reynolds*, 145 Idaho 807; 186 P. 2d 663 (2008), this Court laid out the doctrine in full: "This doctrine applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. C & G, Inc., 139 Idaho at 145, 75 P.3d at 199." *Allen*, 145 Idaho at 812, 186 P.3d at 668.

In the 27 years since *Twin Falls* was decided, this Court has decided nine (9) cases that establishes that the quasi-estoppel branch of the equitable estoppel doctrine, as set out in the KHD opening brief, is not founded upon a false representation, does not require reliance or prejudice and is not based on failure to discover the truth.[1] As held in *Atwood v. Smith*, 143 Idaho 110; 138 P. 3d 310 (2006):

> "The doctrine of quasi-estoppel prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." *Atwood,* 143 Idaho at 114, 138 P.3d at 314.

In amplifying the inconsistent position test, *Birdwood Subdivision HOA v. Bulotti Construction, Inc*, 145 Idaho 17; 175 P. 3d 179 (2007) held that there is no need to show any false misrepresentation, nor detrimental reliance, but there may be alternative evidence to show that it would be unconscionable to permit the offending party to assert contradictory positions, citing *Atwood* at 115. The present situation perfectly meets all of the alternative inconsistent position, detrimental reliance and unconscionability tests. At

[1] Allen v. Reynolds, 145 Idaho 807, 186 P. 3d 663 (2008); Wynn v. Campbell, 145 Idaho 727, 184 P. 3d 852 (2008); Campbell v. Kildew, 141 Idaho 640, 115 P. 3d 731 (2005); In Re Estate of Elliott, 141 Idaho 177, 108 P.3d 324 (2005); Christiansen v. City of Pocatello, 142 Idaho 132, 124 P. 3d 1008 (2005); Birdwood Subdivision HOA, Inc. v. Bulotti Construction, Inc., 145 Idaho 17, 175 P. 3d 179 (2007); Sorensen v. Saint Alphonsus Regional Medical Center, Inc., 141 Idaho 754, 118 P. 3d 86 (2005); C & G, Inc. v. Canyon Highway District No. 4, 139 Idaho 140, 75 P. 3d 194 (2003); and Atwood v. Smith, 143 Idaho, 110, 138 P. 3d 310 (2006).

great cost, KHD prepared a revised application, abated its first appeal, made commitments to build a fire house, a bridge over Highway 97, and other mitigation, and entered into the Post-Mediation Agreement which stipulated the specific issues that would be considered at the second hearing, only to find that the BOCC had completely repudiated its publicly adopted agreement and sandbagged KHD with whole new comprehensive plan goal issues at the second hearing which the BOCC had found KHD to be in compliance with at the first hearing. Moreover, in raising these new comprehensive plan goals, the BOCC contradicted its position at the first hearing, the findings and conclusions and recommendation of the Hearing Examiner (which requires stricter scrutiny by the courts) and perhaps most importantly, repudiated the public policy of the judiciary to consider seriously the provisions of mediation agreements reached in settlement of litigation. Of all of the nine cases decided by this Court on quasi-estoppel, this case is the most compelling.

The position taken by Respondent at page 30 of Respondent's brief that enforcement of estoppel in this situation would compromise the police power of the County rings false. There is no binding contract on the part of the County to adopt the planned development approval, to evade a second hearing on the application or to spot zone the property. The Post Mediation Agreement provided only that certain issues would be entertained at the hearing since the first hearing and the subsequent mitigation actions of KHD had disposed of the remaining issues. This case does not involve an impairment of the County's police power at all.

In deciding quasi-judicial functions the County is not exercising regulatory police power. *Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission*, 128 Idaho 609,

917 P. 2d 766 (1996) (regulatory bodies performing legislative functions are not rigorously bound by administrative doctrines of stare decisis, but are so bound when exercising judicial functions); *Washington Water Power Company v. Idaho Public Utilities Commission*, 101 Idaho 567, 617 P. 2d 1242 (1980) (regulatory action is distinguishable from applying established law or policy to past facts in quasi-judicial function).

In an identical situation the California Court of Appeals upheld a mediation settlement agreement which fixed the issues to be considered at a subsequent county public hearing on a discretionary approval against the arguments of neighboring interveners that the County had bargained away its police power or proscribed the statutory hearing process. *Santa Margarita Area Residents Together v.County of San Luis Obispo*, 84 Cal.App.4th 221, 100 Cal.Rptr.2d 740 (2000). For a full analysis of court decisions rejecting the bargaining away of the police power argument, see David L. Callies, Robert H. Freilich and Thomas E. Roberts, Cases and Materials on Land Use, Development Agreements, 168-182 (5th ed. West, 2008).

The Idaho Supreme Court decisions also reject the assertion made by Respondent at page 29 of its brief, citing a 1973 case, *Harrell v. City of Lewiston*, 95 Idaho 243, 506 P. 2d 741 (1973), asserting that estoppel does not apply to governmental entities. In *C & G, Inc. v. Canyon Highway District* No. 4, 139 Idaho 140, 75 P. 3d 194 (2003) and *Christiansen v. City of Pocatello*, 142 Idaho 132, 124 P. 3d 1008 (2005).

Estoppel theories present mixed questions of law and fact. *The Highlands, Inc. v. Hosac*, 130 Idaho 67, 69; 936 P.2d 1309, 1311 (1997) (citations omitted). Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id.*

The doctrine of quasi-estoppel has two branches: "estoppel in pais and equitable estoppel, which is based on the equitable principle that a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his or her former position or conduct to the injury of another." *Schiewe v. Farwell,* 125 Idaho 70, 74; 867 P.2d 920, 948 (1992). Yet Respondent in its brief relies solely on the law surrounding equitable estoppel as its defense, even though KHD's opening brief shows that its position on equitable estoppel is wrong under Idaho law. Respondent, however, has totally missed the controlling law of quasi-estoppel. See *Campbell v. Kildau*, 141 Idaho 640, 115 P.3d 731 (2005) (distinguishing quasi-estoppel from equitable estoppel).

Respondent is reduced to mere sophistry in arguing against estoppel. It concedes from one side of its mouth that the Post-Mediation Agreement was a contract and that the County was bound by Idaho law to fulfill its contractual obligations; from the other side it argues that there was no contractual obligation on the part of Respondent. The doctrine of quasi-estoppel:

> "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 144, 75 P.3d 194, 198 (2003). This doctrine applies when: (1) the offending party took a different position than his or her original position and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Id.* at 145, 75 P. 3d at 199; *Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 357, 48 P.3d 1241, 1246 (2002)." To prove quasi-estoppel, it is not necessary to show detrimental reliance; instead, there must be evidence that it would be unconscionable to permit the offending party to assert allegedly contrary positions. *Thomas*, 137 at 357, 48 P.3d at 1246." *Atwood v. Smith* 143 Idaho 110, 114; 138 P.3d 310, 314 (2006).

Respondent's argument that the post-mediation application constituted an entirely new application process and that despite the very clear language of the Post-Mediation Agreement, Respondent was under no obligation to fulfill its contractual obligation is sheer nonsense. Notwithstanding Respondent's attempts at obfuscation, the Mediation Agreement could not be clearer. The Agreement sets forth at Paragraph 2 that "[t]he Board and KHD agreed to and hereby identify the actions that applicant KHD can take to obtain a permit/approval of the PUD." Not **some** of the actions applicant can take, but **the** actions that will obtain approval of the PUD. It then identifies, in subsections A, B and C, those certain actions – building sites to comply with all laws, including those for building on slopes; any disturbance of wetlands to comply with all laws; and KHD to mitigate the effect of the development on Highway 97 – required of KHD. In Paragraph 3, the Agreement expedites the hearing schedule so that KHD can comply with the requirements and move forward.

The Post-Mediation Agreement gave both parties something they wanted. Respondent got agreements from KHD to address the County's concerns regarding building on slopes, wetlands and traffic conditions on Highway 97 – the very issues it based its initial denial upon. KHD got an expedited process that would allow it to move forward with its project. "The doctrine of quasi-estoppel applies where it would be unconscionable to allow a person to maintain a position inconsistent with the one in which he or she acquiesced, or of which he or she accepted a benefit." *In re Estate of Elliott*, 141 Idaho 177, 183, 108 P.3d 324, 330 (2005). The County received the benefit of its Post-Mediation Agreement. The District Court case was suspended and the County was saved considerable time and expense in not having to litigate. On the other hand, KHD spent considerable time and money in altering its plans to fulfill the County's stated objections. The doctrine of quasi-estoppel clearly applies in this instance.

Moreover, the Agreement specifically references Idaho Code §67-6519(4)(c), which couldn't be clearer:

> "Whenever a governing board or zoning or planning and zoning commission grants or denies a permit, it shall specify: . . .
> (c) The actions, if any, that the applicant could take to obtain a permit."

The purpose of I.C. §67-6519(4)(c) is to provide transparency in the planning process and to permit developers the opportunity to make revisions that will permit them to move forward. KHD does not have to start from scratch and the BOCC does not get a new bite of the apple. If KHD did not meet the terms of the Mediation Agreement, the BOCC could deny the permit. The corollary was that upon meeting the terms of the Agreement, KHD would accomplish the requirements of the conceptual stage and would be allowed to go to the next stage. Contrary to the Respondent's argument, the hearings would not be a sham because the opportunity for public hearings to raise objections had already occurred. The public had raised its objections, and the BOCC had denied the application – that is why the case went to the District Court, and why there had been a mediation and a mediation agreement – the second round of expedited hearings were to follow up on KHD's fulfillment of its contractual obligation under the agreement.

KHD had an absolute right, as a matter of law, to bring a new application; it didn't need an agreement for that. Following Respondent's argument to its logical conclusion, there would be no point whatsoever to this, or any, mediation agreement with the County if all it means is that the County gets not just a new bite of the apple, but a whole new apple!

Not only did Respondent violate the Mediation Agreement, its legal argument appears to be that I.C. §67-6519(4)(c) is meaningless, that Respondent may identify **some** actions an applicant can take, but reserves the right to come up with **other** actions not previously identified. In other words, the Respondent argues the entire application process can be turned into a shell

game where the Respondent gets to simply keep moving the target! Could anything be more arbitrary and capricious? This claimed ability of the County to play shell games is exactly why Respondent is estopped from bringing up new reasons for denying KHD's application.

IV. ADMINISTRATIVE FINALITY, COLLATERAL ESTOPPEL AND RES JUDICATA PREVENT RESPONDENT FROM TAKING A NEW BITE OF THE APPLE IN THE SECOND HEARING.

The doctrine of issue and claim preclusion, or res judicata, applies to administrative decisions. *Madsen v. Idaho Department of Transportation*, 115 Idaho 1132, 722 P. 2d 1226 (1989); *Blackburn v. Olson*, 69 Idaho 428, 433, 207 P.2d 1160, 1163-64 (1949); *Pence v. Idaho State Horse Racing Comm'n*, 109 Idaho 112, 115, 705 P.2d 1067, 1070 (Id. App. 1985).

The doctrine of res judicata covers both claim preclusion (true res judicata) and issue preclusion (collateral estoppel). *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion bars a subsequent action between the same parties upon the same claim or upon claims "relating to the same cause of action . . . which might have been made." *Id.* Issue preclusion protects litigants from litigating an identical issue with the same party or its privy. *Rodriguez v. Dep't of Corr.*, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001).

Separate tests are used to determine whether claim preclusion or issue preclusion applies. See *D.A.R., Inc. v. Sheffer*, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000). Indeed in *Ticor Title Company v. Stanion*, 144 Idaho 119,123; 157 P. 3d 613, 617 (2007), the court held that res judicata: (1) serves to prevent **corrosive disrespect** which would follow if the same matter were twice litigated to inconsistent results; (2) serves the public interest in protecting the courts against the burden of repetitive claims; and **advances (3) the private interest in repose from the harassment of repetitive claims**, citing *Hindmarsh* at 98. That is exactly the situation we

have in this case with the repetitive harassment of KHD and the inconsistent positions taken by the BOCC.

A. Issue Preclusion.

Issue preclusion protects litigants from having to relitigate an identical issue in a subsequent action. *Rodriguez*, 136 Idaho at 92; 29 P.3d at 403. Five factors are required in order for issue preclusion to bar the relitigation of an issue determined in a prior proceeding:

> "(1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation." *Rodriguez*, 136 Idaho at 93, 29 P.3d at 404.

In the present instance, the administrative process was complete. The County Planning Staff had been intimately involved in the matter throughout and the hearings before the Hearing Examiner and then before the BOCC gave the public ample opportunity to raise any and all issues. At the conclusion of the first set of hearings, the BOCC concluded that KHD's application failed to fulfill only two comprehensive plan goals – goals 7 (prevent or limit development activity in hazardous areas) and 14 (provide for the efficient, safe and cost-effective movement of people and goods) – which were specifically addressed and mitigated in the Post-Mediation Agreement.

The doctrine of res judicata applies to all questions which **might** have been raised as well to all questions which were raised in the original agreement. In *Andrus v. Nicholson*, 145 Idaho 774, 777, 186 P. 3d 630 (2008) this Court held:

" As we said in *Joyce v. Murphy Land & Irrigation Co.*, 35 Idaho 549, 553, 208 P. 241, 242-43 (1922), "[T]he former adjudication concludes parties and privies not only as to every matter offered and received to sustain or defeat the claim, but **also as to every matter which might and should have been litigated in the first suit.**" The prior adjudication "extinguishes all claims arising out of the same transaction or series of transactions out of which the cause of action arose." *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150; 804 P.2d 319, 323 (1990) (Emphasis added).

At the time of the second hearing, the BOCC unilaterally reopened seven (7) comprehensive goal issues, concluding, despite its earlier findings, the findings of the Hearing Examiner, the Planning Department and the Post-Mediation Agreement, that the application fulfilled goals 4, 7, 9, 14, 17, 23 and 24. The County was precluded from making new findings with regard to (1) the goals it had concluded at the first hearings, had been satisfied; and (2) the goals it had previously had the opportunity to address.

B. Claim Preclusion.

For claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim or transaction; and (3) final judgment. *Hindmarsh*, 138 Idaho 92 at 94; 57 P.3d at 805; *Farmers Nat'l Bank v. Shirey*, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994). In *Andrus*, 145 Idaho at 777, this Court held that

> "The determination of whether a group of facts constitutes a "transaction" is to be made "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments §24 (1982). **A cause of action can be barred by a prior adjudication even though the theory of liability and supporting evidence differ from the cause of action actually litigated** in the prior lawsuit. *Magic*

Valley Radiology, P.A. v. Kolouch, 123 Idaho 434, 437-39, 849 P.2d 107, 110-112 (1993)."

"The doctrine of claim preclusion extends to the decisions of administrative agencies." *Pence v. Idaho State Horse Racing* Comm'n, 109 Idaho 112, 707 P.2d 1067 (Idaho App. 1985). There can be no dispute but that the same parties and the same matter were brought before the County in a quasi-judicial hearing and that the same facts and circumstances applied to the second hearing. The County was therefore barred from re-litigating the issues that had been decided at the time of the first hearing and of raising new issues that it had the opportunity to raise, but failed to do so.

V. AN AWARD OF ATTORNEY'S FEES TO KHD IS CLEARLY APPROPRIATE IN THIS INSTANCE, WHERE RESPONDENT ACTED WITHOUT A REASONABLE BASIS IN FACT OR IN LAW.

It has long been the law in Idaho that attorney's fees may properly be awarded against a city or county. *Averitt v. City of Coeur d'Alene*, 100 Idaho 751; 605 P.2d 515, 516 (1980).

> "Idaho Code §12-117(1) states that: In any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law. I.C. §12-117(1) (2004). This Court has held that the purpose of this statute is "two-fold: '(1) to serve as a deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should have made." *Rincover v. State, Dep't of Fin., Secs. Bureau*, 132 Idaho 547, 549; 976 P.2d 473, 475 (1999) (quoting *Bogner v. State Dep't of Revenue & Taxation*, 107 Idaho 854, 859; 693 P.2d 1056, 1061 (1984)). If the Court determines that a party acted without a reasonable basis in fact or law, an award of attorney fees under I.C. § 12-117 is **mandatory**." *Rincover v. State, Dep't of Fin., Secs. Bureau*, 132 Idaho 547, 549; 976 P.2d 473, 475 (1999). (Emphasis added.)

Respondent, at page 41 of its brief, has the temerity to suggest attorney's fees should not be awarded because the Court is asked to interpret a statute for the first time within the context of the facts of this case. Respondent does not mention how the facts here are "novel, nor what statute it believes the Court will be interpreting for the first time.

The reality of the situation is that the County has, throughout this process, acted without a reasonable basis in fact and law and in utter disregard for its quasi-judicial responsibilities. The law here is clear. It is undisputed that the BOCC is required to act in a quasi-judicial capacity when it considers whether to approve or deny applications for subdivisions and PUDs. "A decision by a zoning board applying general rules or specific policies to specific individuals, interests or situations, are quasi-judicial in nature and subject to due process constraints." *Chambers v. Kootenai County Bd. of Comm'rs*, 125 Idaho 115, 118 (1994) (applying zoning rules to specific applications is quasi-judicial); *Cowan v. Bd. of Comm'rs of Fremont County*, 143 Idaho 501 (2006); *Cooper v. Board of County Comm'rs of Ada County*, 101 Idaho 407, 411 (1980). Neither the BOCC, nor any individual Commissioner, is allowed to advocate approval or denial of the application. "When acting upon a quasi-judicial zoning matter the governing board is neither a proponent nor an opponent of the proposal at issue, but sits instead in the seat of a judge." *Marcia T. Turner, LLC v. City of Twin Falls*, 144 Idaho 203, 159 P. 3d 840, 846 (2007). Instead, the BOCC has ignored competent scientific evidence in favor of emotional lay argument and prognostication as to hypothetical future applications for building permits; has violated KHD's due process rights with un-noticed amateur traffic studies; has ignored its own specific zoning ordinance in favor of generic comprehensive plan concepts; has violated its Post-Mediation Agreement with KHD and has violated the basic precepts of res judicata, and has

made decisions based on political climate – all to satisfy the public's anti-development sentiment.

In addition, the County in direct contradiction to the issues that were limited to be heard in the second BOCC hearing by the Post-Mediation Agreement, violated quasi-estoppel and administrative res judicata, claim and issue preclusion as a question of law and fact. Res Judicata is clearly applicable to administrative decisions under Idaho law. *Idaho State Bar v. Everard*, 142 Idaho 109, 124 P. 3d 985 (2005); *Sagewillow, Inc. v. Idaho Department of Water Resources*, 138 Idaho 831, 70 P. 3d 669 (2003); *J&J Contractors v. State by Idaho Transportation Board*, 118 Idaho 535, 792 P.2d 1383 (1990).

Under these circumstances, attorney's fees are properly awarded. In the recent case of *C Systems, Inc. v. McGee*, 145 Idaho 559, 562, 563, 181 P.3d 485 (2008) this Court stated:

> "In addition, in an action...[where]...every matter which might and should have been litigated in the first suit, the C Systems claims were clearly barred by res judicata and we award costs and attorney's fees to McGee.", citing *Andrus v. Nicholson*, 145 Idaho 774, 186 P. 3d 630 (2008); *Joyce v. Murphy*, 35 Idaho 549; 208 P. 241, 242-243 (1922).

As the Court set forth in *Rincover, supra*, an order of attorney's fees in favor of KHD is mandatory.

VI. CONCLUSION

Whereas conclusively shown in KHD's opening and this reply brief, this Court should reverse the decision of the District Court and remand for further proceedings to the Board of County Commissioners of Kootenai County, with instructions to approve, or at the minimum rehear, the KHD applications for planned development and subdivision approval on the basis that the decision of the Board denying such applications was: made upon unlawful procedures;

affected by error of law with respect to the application of the doctrines of quasi-estoppel, res judicata and issue preclusion; clearly erroneous in view of substantial evidence in the record as a whole; a violation of the constitutional right to procedural and substantive due process; is arbitrary and capricious and constitutes an abuse of administrative and quasi-judicial discretion. *Knight v. New Mexico Department of Insurance*, 124 Idaho 645; 862 P.2d 337 (Id. App. 1993). Where the principles of quasi and equitable estoppel, and issue preclusion govern the proceeding, it is right and proper for this Court to reverse and remand to the district court to enter a final order and judgment declaring that the planned development and subdivision approvals be granted and that the district court remand to Kootenai County for processing the final ministerial approvals for the project.

DATED this 29th day of July, 2009

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CERTIFICATE OF SERVICE

Pursuant to I.A.R. 34, I hereby certify that on this 3rd day of ~~June~~ August, 2009, I caused an original and six (6) bound copies and one (1) unbound, unstapled copy of this brief to be sent via first class mail, postage prepaid, to be filed with the Clerk of the Supreme Court, and further certify that I caused to be served two (2) true and correct copies of the foregoing via first class mail, postage prepaid, and addressed to the following:

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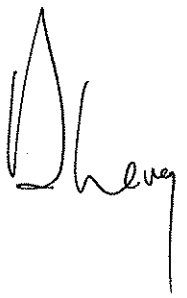

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